The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Afghan Carpet Services, Inc.

File: B-231348

Date: September 9, 1988

DIGEST

Even though the contracting agency was not at fault regarding the incumbent contractor's failure to receive the solicitation, contract award was improper where a comparison of the award price and the price in the option of the incumbent's contract--which the agency had decided not to exercise--shows that, despite certain differences in the two contract efforts, the contract price is unreasonably high.

DECISION

Afghan Carpet Services, Inc., a small business contractor with the Department of Labor (Labor) for carpet installation, removal and repair services, protests Labor's failure to notify the firm of invitation for bids (IFB) No. D/L 88-7, issued as a small business set-aside for a similar contract. Afghan contends that Labor's failure prevented Afghan from competing and violated the requirement in the Competition in Contracting Act (CICA) of 1984, that contracting agencies follow procedures that will assure full and open competition. Afghan also points out that CICA requires an agency to obtain the best price available, and argues that the price of the contract awarded in the procurement was unreasonably high since it was substantially more than the price of the option year in Afghan's contract (which Labor had decided not to extend). Afghan argues that Labor therefore should terminate the contract and either exercise Afghan's option or resolicit.

Although we do not find Labor at fault regarding Afghan's failure to receive a copy of the solicitation, we sustain the protest because we do not think the contract price can be viewed as reasonable.

Solicitation Receipt

Labor had a synopsis of the procurement published in the Commerce Business Daily (CBD) on February 19, 1988, advising potential bidders of an anticipated IFB issuance date of March 31, and of the deadline for solicitation requests. According to Labor, on March 31 it mailed the IFB to the 22 firms responding to the notice as well as to Afghan, specifying that bids would be opened on May 2. Only three firms submitted bids by May 2, one of which was determined to be nonresponsive. Contract award was made on May 5 to the second low and responsive bidder, Pearl's Carpet Service. Pearl's also was an incumbent contractor for carpet services, under a contract that expired on June 15. Afghan's contract expired on June 6.

Afghan, which maintains that it did not receive the IFB, contends that since it is an incumbent contractor Labor should have verified Afghan's receipt of the document. Citing our decisions in Bonneville Blue Print Supply, B-228183, Nov. 18, 1987, 67 Comp. Gen. ___, 87-2 CPD ¶ 492, and Trans World Maintenance, Inc., 65 Comp. Gen. 401 (1986), 86-1 CPD ¶ 239, Afghan contends that Labor should resolicit the requirement because, by excluding Afghan, the agency failed to obtain full and open competition as required by CICA.

Labor responds that it mailed the IFB to Afghan on March 31, the issuance date, and that since the IFB was not returned to the agency, it must be assumed that the protester received it. Further, Labor notes that since the procurement was publicized in the CBD, Afghan could have contacted Labor for a copy of the IFB.

CICA places a duty on contracting agencies to take positive and effective steps toward assuring that all responsible sources are permitted to compete. When procuring property or services, agencies therefore are required to obtain full and open competition through the use of competitive procedures. 41 U.S.C. § 253(a)(1)(A) (Supp. IV 1986). In view of Congress' clear intent to make full and open competition the standard for conducting government procurements, we give careful scrutiny to an allegation that a potential bidder has not been provided an opportunity to compete for a particular contract, taking into account all of the circumstances surrounding the contractor's nonreceipt of the solicitation, as well as the agency's explanation therefor. Trans World Maintenance, Inc., 65 Comp. Gen., supra. We have sustained protests and recommended resolicitation where we found that a firm's failure to receive a solicitation was the result of significant deficiencies on

the part of the contracting agency. See Bonneville Blue Print Supply, B-228183, supra, where the protester, an apparently responsible incumbent contractor, was not provided with a solicitation for a follow-on contract after requesting it several times; and Trans World Maintenance, Inc., 65 Comp. Gen., supra, where the protesting incumbent contractor was not provided with the solicitation after numerous requests and agency assurances that the protester would be placed on the bidders mailing list and provided with the solicitation.

We have recognized, however, that CICA's full and open competition requirement should not be read so broadly as to require an agency to accept a late submission or to resolicit whenever the agency inadvertently contributes to a particular contractor's failure to receive solicitation materials. In such cases, we have held that an agency satisfied CICA's full and open competition requirement when it made a diligent, good faith, effort to comply with the statutory and regulatory requirements regarding notice of the procurement and distribution of solicitation materials, and it obtained a reasonable price. NRC Data Systems, 65 Comp. Gen. 735 (1986), 86-2 CPD ¶ 84.

We have reviewed the record, and we find nothing to indicate that Labor inadvertently, or otherwise, contributed to Afghan's failure to receive the IFB; the record instead shows that Labor took all reasonable steps to ensure that it met the notice and solicitation distribution requirements of CICA. The agency announced the solicitation in the CBD on February 19, well in advance of the IFB's March 31 issuance date, which constituted constructive notice of the procurement. See Marine Instrument Co., B-228462, Nov. 9, 1987, 87-2 CPD ¶ 468. Although Pearl's, another incumbent contractor, and 21 other potential bidders wrote Labor requesting the IFB, Afghan did not do so. Moreover, and notwithstanding Afghan's failure to request the IFB, Labor claims it mailed Afghan a copy of the IFB. Labor has provided, in support of its claim that it solicited Afghan, a copy of its bid source mailing list, which includes Afghan's address. In this regard, we note that Labor is not required to provide proof of mailing because the bidder bears the risk of nonreceipt of a solicitation in the absence of proof that the agency deliberately attempted to exclude a bidder from participating in the procurement. Uniform Rental Service, B-228293, Dec. 9, 1987, 87-2 CPD ¶ 571.

Price Reasonableness

Labor argues that a comparison of Afghan's option price and the new contract price is simplistic and misleading; it is Labor's position that the award to Pearl's was at a reasonable price notwithstanding the fact that Afghan's option price appears to be substantially lower. Labor points out that the new contract includes a revised Service Contract Act wage determination, which requires the payment of higher wages than those mandated in Afghan's contract. Labor further argues that the new contract requires that power stretchers be used on already-installed carpet, which was not a requirement under Afghan's contract. According to Labor, these represent material differences between the two contracts.1/

Afghan responds that its employees' salaries already were higher than those reflected in the Service Contract Act wage increase, and that it recognizes it would be legally obligated to pay the new rates in the option period. Afghan further argues that it always has been prepared to use power stretchers whenever requested2/ and would not have charged anything extra had their use been specified or mandated in particular situations. Afghan contends that its option price in fact is an accurate reflection of a reasonable price for the services in the contract awarded to Pearl's.

We are not convinced that the award price was reasonable in light of the price of the unexercised option in Afghan's contract. It is not clear from the record exactly what exercising Afghan's option, or contracting with Pearl's, would cost the government. Bidders in both the procurement that resulted in Afghan's contract and the protested procurement provided unit prices for various line items, such as a price per square yard for carpet and padding installation for regular time work and another for Sunday and holiday work. For evaluation purposes, the contracting officer determined the lowest bid price by multiplying the bid price for each item by the applicable weight factor stated in the solicitation's evaluation section. For example, the weight factors for bid item 4a, finish and

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1/ It is not clear from the record whether these differences, or concerns about Afghan's performance, were the reasons why Labor did not exercise the option in Afghan's contract.

2/ Labor reports, however, that in its view Afghan has been very reluctant to use power stretchers.

install door strips, were 2.5 for regular work and .5 for Sunday and holiday work. Thus, a bid of $1 for the regular work would be evaluated at $2.50, and the same bid for the Sunday and holiday work would be evaluated at $.50. The "weighted prices" for all items for all 3 years then were added together to arrive at a single "cumulative weighted price" for purposes of selecting the contract. Pearl's cumulative weighted price was $1,035, and Afghan's cumulative weighted option price was $547.3/

From the cumulative weighted prices it appears that Labor will be paying Pearl's about twice what it was paying Afghan. We do not see how either of the factors on which Labor relies for ignoring Afghan's option price--the new Service Contract Act wage determination, and the power stretcher requirement--possibly could narrow the gap between the two weighted prices to lead to a judgment that the contract price was reasonable. First, the wage determination in issue increased the wages for carpet layers from $9.74 per hour to $10.57 per hour and, while we recognize these are labor-intensive contracts, Labor does not show how the $0.83 per hour increase could have had any substantial effect on the difference between the two prices, especially in view of Afghan's argument on this issue.

Second, as to the power stretcher issue, the requirement in the new solicitation is stated in one of the 15 line items: "Carpet stretching not associated with carpet installation and repair. (Including Power Stretchers as necessary)." The related requirement in Afghan's contract was just for "Carpet stretching not associated with carpet installation." Under each contract, the estimated annual requirement was 66 square yards, Afghan's price for that line item was $0.90 per square yard for both regular time and Sunday/holiday work. Pearl's bid $1.45 per square yard for regular time, and $1.65 per square yard for Sunday/holiday work. Labor concedes that power stretchers were used at times under Afghan's contract, and does not explain how a requirement for them "as necessary" effects any real change. While the agency seems to suggest that the requirement as newly stated might make it easier for the contracting officer to get the contractor to use power stretchers, Labor simply does not explain the specification's price impact.

3/ We do note that in both cases the contractor was guaranteed a total of $8,000 of work for all 3 years, with a maximum total value for all work orders issued of $100,000.

As stated above, CICA's requirement for full and open competition is not met where a procurement did not include an incumbent and did not result in award at a reasonable price. Federal Acquisition Regulation § 14.407-2 (FAC 84-8) requires a contracting officer, in determining whether prices offered are reasonable, to take into account "all prevailing circumstances." In view of Afghan's option price, we fail to see how the agency could have determined that Pearl's offered price was reasonable.

The protest is sustained. By separate letter of today to the Secretary of Labor, we are recommending that Labor offer Afghan the opportunity to revive its option price, with whatever minor clarifications Labor believes are necessary. If Afghan does so--we note Afghan has proposed such a remedy in its protest submissions--Labor should terminate the awarded contract, under which performance was suspended pending our decision, and exercise the option, if otherwise appropriate. In this respect, we point out that under FAR § 17.207 (FAC 84-37) the exercise of an option is appropriate if a new solicitation fails to produce a better price or a more advantageous offer.

Milton J. Socolar

for Comptroller General
of the United States